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No. 104

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Supreme Court, U. S.
FILED
APR 11 1903
JAMES H. McKENNEY,
Clerk.

THE GERMAN SAVINGS AND LOAN SOCIETY,
PLAINTIFF IN ERROR,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL AND ERNEST B. TULL,
DEFENDANTS IN ERROR.

Brief for Plaintiff in Error Upon Motion to Dismiss or Affirm.

E. C. HUGHES,
W. W. HINDMAN,
W. S. GOODFELLOW,
Counsel for Plaintiff in Error.

Filed ..... *1903.*

SUPREME COURT OF THE UNITED STATES.

No. 404.

October Term, 1902.

THE GERMAN SAVINGS AND LOAN SOCIETY,
Plaintiff in Error,

vs.

DORA MAY DORMITZER, WILLIAM L. TULL and ERNEST B. TULL, Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Motion to Dismiss or Affirm.

In this cause two motions to dismiss or affirm have been noticed and separate briefs have been filed in support thereof. One motion is by Mr. Howard as "counsel for defendants in error"; the other is by Mr. Dewart as counsel for one only of the defendants in error, namely, Ernest B. Tull, a minor.

The grounds of the two motions are not entirely alike. In that of Mr. Howard the grounds are shortly that no federal question is *necessarily* involved; that the federal question is frivilous, and if there is such a question it has been correctly decided by the State Court; that a question other than federal was decided by the State Court against the plaintiff in error, which question alone is sufficient to sustain the judgment; that the matter decided was the ownership of property and it was so decided independently of the Kansas decree of divorce, to which, the plaintiff in error alleges, due faith and credit was not given.

In Mr. Dewart's motion the grounds are, that no federal question was set up or claimed; that the judgment of the State Court may be sustained upon a ground not federal in character; and that if there was a federal question it was correctly decided.

It is apparent therefore that Mr. Dewart assigns on behalf of the minor defendant a ground for dismissal which is not assigned by the other defendants in error, namely, that the alleged federal question was not specially set up or claimed. In other respects all the grounds of the one motion are embraced within the other. The ground of motion specially assigned by Mr. Jewett will first be treated of by us; all other grounds will be treated of as common to all the defendants in error.

As to the facts of the case. We may say, that in our opinion both in the decision of the Supreme Court of the State of Washington and in the briefs of counsel in this Court the actual facts of the case are obscured by repetition at great length of allegations of the defendants in error contained in their pleadings in the Superior Court at Spokane, which allegations were denied by the answer of the plaintiff in error, and not proven, and in copying allegations from pleadings in other cases to which this plaintiff in error was not even a party. *It is essential to a correct apprehension of this case that what was proved should be carefully and clearly distinguished, from what was alleged.*

From our point of view a statement of the case may be correctly and shortly given as follows:

The plaintiff in error is a Savings and Loan Society or Savings Bank, incorporated in California. In this litigation it has been generally referred to as the "Society." At the times in question it was making loans upon mortgage of real estate in the State of Washington. It would seem that its president and secretary were accustomed to examine for themselves the character of the security upon which loans were to be made, and to establish in cities, arbitrary limits within which they would be willing to make loans. (Trans., p. 189.) In this case F. M. Tull, the father of the defendants in error, made application for a loan upon the real property in question situated in the town of Spokane. The application was made in writing through B. Goldsmith, who resided at Portland; he was the appointee or statutory agent of the Society in the State of Oregon for the purpose of accepting service of process in that State pursuant to a requirement of its laws. We claim that Goldsmith throughout this transaction acted as a broker for a commission of $1200, to be paid to himself and one Cutter, by Tull, the applicant for

the loan, and that Goldsmith was not the agent of the Society in any respect, and that notice or knowledge upon his part of any facts material to this controversy are not imputable to the Society.

The application of Tull for a loan upon the property was accepted by the Society, whereupon proceedings were had to satisfy it as to the title and to execute the necessary mortgage and other papers. As was customary, the applicant for the loan was required to furnish an abstract of title. Such abstract was delivered to Messrs. Cox, Teal & Smith, attorneys and counselors, at Portland, Oregon. Upon examination of the abstract they issued their certificate as to the sufficiency of the title, upon faith of which the Society made the loan. All the expenses of obtaining the abstract and the certificate of counsel were borne by the applicant. The Society had selected and designated Messrs. Cox, Teal & Smith as Counsel whose certificates would be accepted by it. The fees of counsel were paid not by the Society but by the borrower; in this case it appears that they were paid by Goldsmith and Cutter, the brokers, out of their commission, pursuant to an agreement to that effect with Tull, the applicant. We contend, if the question be material, that any knowledge acquired by Messrs. Cox, Teal & Smith, is not imputable to the Society. They were not its agents, nor occupied any position different from that of Title Insurance or Guaranty Companies who are accustomed to issue certificates or policies insuring title to real estate. It does not appear, however, that Messrs. Cox, Teal & Smith did acquire any information as to this title other than such as they acquired from the abstracts of the public records, and we submit that the public records, copies of which are in this transcript, show a title in F. M. Tull which cannot be successfully attacked. These records include a probate sale of the interest of the defendants in error, which probate sale is in all respects regular upon its face. The guardian's deed recites payment of the purchase money.

But prior to this loan being consummated a difficulty had arisen in respect to the title. After F. M. Tull had made his application to the Society and the same had been accepted Lucy A. Tull his wife died. According to the laws of the State of Washington, property acquired by

husband and wife subsequent to their marriage (with certain exceptions) is community property, and upon the death of the wife one-half of such property vests in her heirs. The heirs of Lucy A. Tull in this case are the three defendants in error. Upon the death of the wife it seems to have been assumed by F. M. Tull, or those advising him, that some proceedings in respect of his children's interests would be necessary in order to make a title satisfactory to the Society. Mr. Tull engaged the services of Mr. Graves, an attorney and counsellor at Spokane, and the proceedings in the probate court for the appointment of a guardian for the children and the sale of their interests in this property were conducted by Mr. Graves. The guardian appointed was the brother of F. M. Tull, the applicant. It is apparent that Mr. J. M. Kinnaird, also an attorney and counsellor, conferred or co-operated with Mr. Graves in the conduct of these proceedings. It is positively denied by the Society that Mr. Kinnaird acted in anywise on its behalf. We submit that there is no evidence to show that he did, but that on the contrary it is reasonably certain that he was employed by Mr. Goldsmith and Mr. Cutter on their behalf and in aid of their contract for commissions to procure the abstract of title, and incidentally to assist in perfecting the title to the end that it should be acceptable to Messrs Cox, Teal & Smith. There is some evidence tending to show a correspondence of some character between Mr. Kinnaird and Messrs. Cox, Teal & Smith. If it be assumed that it related to this transaction the most that can be conjectured or inferred is that he inquired of them as an abstract proposition what character of title would be satisfactory to them. It surely appears that this was some time prior to their being engaged in the actual examination of the abstract for the purpose of a loan by the Society. There is no evidence to show what information, if any, they obtained, nor that it was present to their minds when subsequently examining the title, or that the information was acquired by the same member of the firm who subsequently made the examination.

Upon faith of the certificate of Messrs. Cox, Teal & Smith, the loan was made and subsequently renewed, and additional loans made; finally the mortgages were foreclosed and the Society acquired title to the property.

Thereafter two of these defendants in error commenced this action in the Superior Court at Spokane making the minor a defendant in said action. The minor appeared therein and filed a cross-complaint against the Society. The claims of the defendants in error in their complaint were that F. M. Tull had not paid in cash the purchase money when he purchased from their guardian their interest in these premises, but had given a mortgage to the guardian therefor; that the guardian had released the mortgage without receiving payment in fact; wherefore, they claimed that their mortgage was still a valid lien upon the premises, and they asked to have it foreclosed as such and to set aside the release thereof appearing of record. They claimed that the Society had notice of their mortgage being released without payment, and claimed that such release was "pursuant to a conspiracy made and entered into by the defendants F. M. Tull, P. D. Tull and The German Savings and Loan Society, some time in the year 1888 with the fraudulent purpose and intent, among others, of cheating and defrauding these plaintiffs and their brother" (Trans., page 6). The plaintiffs in said action, defendants in error, then proceeded to allege that they and their brother were the owners of an undivided one-half interest in these premises and set forth in detail the proceedings for appointment of a guardian and the probate sale resulting in a guardian's deed being made to F. M. Tull. The prayer of their complaint was for a reinstatement of their lien and foreclosure of their mortgage and for general relief. The minor defendant in his cross-complaint set up the same things, but prayed in effect that the probate sale be declared to be null and void, and that he be adjudged to be the owner of his original interest in the premises, with the alternative if such relief could not be had, of foreclosure of the mortgage given by F. M. Tull to his guardian. To this complaint and cross-complaint the Society filed an answer denying all the material allegations of the plaintiffs and the cross-complainant, and also pleaded affirmatively that it had made this loan upon faith of the public records and the certificate of Messrs. Cox, Teal & Smith, and without notice or knowledge of the various matters complained of respecting the probate sale. The Society further pleaded that the three children of Lucy A. Tull never had any interest in these premises,

and in that behalf pleaded, firstly, that F. M. Tull and Lucy A. Tull were married March 3d, 1870, and from that time until the 20th day of May, 1887, "resided in and were actual bona fide householders, residents, inhabitants and citizens of the State of Kansas;" that on the 25th day of February, 1887, the said F. M. Tull commenced suit for divorce against his said wife in the District Court of Kingman County in the State of Kansas; that service of the summons was made upon the defendant in said suit and that thereafter, on the 20th day of May, 1887, the said District Court entered a decree of divorce by reason of which the said F. M. Tull and Lucy A. Tull became and remained single persons. The Society also pleaded the laws of Kansas relating to divorce and the constitution of the District Court, and also as to the property rights of husband and wife from which it appeared, among other things, that by statute "a divorce granted at the instance of one party shall operate as a dissolution of the marriage contract as to both, and shall be a bar to any claim of the party for whose fault it was granted in or to the property of the other." (Trans. page 46.) The Society pleaded that while in Kansas Tull had acquired property of large value; that after obtaining the divorce he brought the proceeds of that property into the State of Washington and used the same in the purchase of the property in question, whereby it became his separate property.

The Society also set up the laws of Kansas as to the rights of husband and wife in property acquired there and claimed, and contended that, apart from the divorce, F. M. Tull was the owner of that property, and that the property purchased in the State of Washington here in question was also his separate property and not the community property of himself and wife.

As a further defense, the Society set up the proceedings in probate and claimed that the same were effective to divest the children of all interest in these premises. It also set up the fact that F. M. Tull had commenced a suit against his children and their guardian asking the Court to adjudge that the notes and mortgages which he had given to the guardian were without consideration, and were executed under a mistake as to their title, etc., and that the Court had issued an injunction which was still in force. At the time of the trial of this action it appeared that the action of F. M. Tull had been dismissed.

The plaintiffs in the Superior Court and the minor cross-complainant therein filed replications according to the State practice and in response to that portion of the answer of the Society which set up the Kansas decree of divorce the replications made admissions and statements which are material to be considered upon this writ of error. Although this transcript contains but one replication, it is apparent that there were two pleadings filed of that character. (Transcript of Record, pages 60 and 317.) From page 70 it would appear that an amended answer of the Society was filed at the trial and that an order of Court was asked that the original replication stand, and that the defendants in error might file a further reply if so advised. In the opinion of the Supreme Court of Washington (Trans., page 317) it is said these additional replies are to be construed "as part and amendatory of the replies theretofore filed."

In none of these replies did the defendants in error plead that the Kansas decree of divorce was void by reason of the matters upon which the Supreme Court of Washington has based its decision. On the contrary, in the first of their replies (Tr. p. 314) they expressly admitted "that F. M. Tull and Lucy A. Tull were intermarried and became husband and wife on March 3rd, 1870, and *resided in Kansas up to and prior to May 20th, 1887.*" They also alleged (p. 315) that the divorce had been procured by *fraud* practiced upon the wife; that no process was ever served upon her; "that *about the first day of May, 1887, F. M. Tull and Lucy A. Tull left the state of Kansas and never thereafter resided in said state*, and that just before leaving and when in the act of boarding a railroad train, some person, to her unknown, handed her certain papers; that before she could read or examine the papers they were taken from her by her husband who said he knew what the papers were and would attend to the same," etc.; that she never knew what the papers contained until two months thereafter when she was informed that the same was a complaint for divorce. As soon as she discovered that such divorce had been obtained, she commenced an action in the state of Washington to recover a half interest in this property and to have it adjudged that the divorce had been obtained by fraud, etc. For further reply the defendants in error alleged (Tr. p. 317) that F. M. Tull and

Lucy his wife, were married in 1870 and remained husband and wife until July, 1888, when the wife died. They deny knowledge sufficient to form a belief as to whether or not a divorce was granted, and deny every allegation contained in paragraphs 5 and 6, etc.

As the result of the trial in the Superior Court at Spokane findings of fact and conclusions of law were made and filed in favor of the Society and the same are set forth at length in the brief filed by the defendants in error then appellants in the Supreme Court of the State of Washington; copies of the briefs we understand have been certified by one of the defendants in error to this court. Upon their appeal, the judgment of the Superior Court was reversed and final judgment ordered in favor of all the defendants in error for a one-half interest in the property; to reverse which judgment this writ of error has been sued out by the Society.

The foregoing statement of course includes many matters which are not the subject of review by this Court, but it is material that the whole case be understood particularly in view of the question whether or not the judgment of the State Court may be sustained upon a ground not federal in character.

ARGUMENT.

Proceeding now to a consideration of the motion to dismiss, made by the minor defendant in error, on the ground that no federal question was set up or claimed, we would make response thereto as follows:

(*a*) In point of fact such federal question was set up and claimed towit, firstly, in the amended answer filed in the Superior Court. The mere setting up of a judgment of a court of a sister State, and asking that effect be given to it, introduces a federal question. A reliance upon the Constitution of the United States is necessarily involved. It has never been held that any set phrase of words is required to set up or claim a federal right. If this Society had gone further and annexed to its answer a copy of the Constitution of the United States or of this particular paragraph of the Constitution, it might have been informed by the Superior Court that it is the office of pleadings to allege facts, and that the courts are supposed

to know the law, and particularly the most familiar provisions of the fundamental law of the United States.

But we are not without authority upon this point. In the case of *Des Moines Navigation & R. R. Co.* vs. *Iowa Homestead Co.*, 123 U. S., 552, it would seem that the party went no further than to plead the judgment relied upon, and upon appeal to the Supreme Court of Iowa from a judgment against it, the party assigned as error simply that "the Court erred in holding that plaintiff was not estopped from prosecuting this suit by the former adjudication", etc. (123 U.S., 554). The Supreme Court of Iowa refused to pass upon the question and was reversed by this Court upon a writ of error as having, in effect, decided against the federal right "*which was actually set up and claimed*" (page 555).

It would seem that in the case of *Huntington* vs. *Atrill*, 146 U. S., the party merely pleaded the judgment of the sister State, and that the federal question was first mentioned by one of the dissenting judges in the Court of Appeals. This court upon writ of error said (146 U. S., 666):

"The question whether due faith and credit were thereby denied to the judgment rendered in another State is a federal question, of which this court has jurisdiction on this writ of error."

(*b*) Upon the trial of the case in the Superior Court a transcript of the record of the Kansas decree was offered in evidence, whereupon objection was made to it upon the part of the defendants in error, and Mr. Hughes, counsel for the Society, then said, among other things, "it is certified by the Clerk and the Judge in the manner provided by the act of Congress. The question is one, too, that goes back to and reviews the hearing upon demurrer", etc. (Trans., bottom page 201.)

The court and counsel were then surely advised that the Society claimed full faith and credit for this record under the Constitution and act of Congress, and from what was said as to a hearing upon demurrer, it must be inferred that the matter had previously been argued upon demurrer to that portion of the answer.

The record which was then introduced in evidence was certified in accordance with the Act of Congress. This was a manifestation of the purpose of the plaintiff in error to

rely thereon. It was long ago decided by this Court (14 Wallace, 238) that in order to avail one's self of the right to full faith and credit, the transcript must be certified in the manner provided by the Act of Congress. The matters herein mentioned were of course presented to the Supreme Court of the State of Washington, being a part of this record, which went up to that Court from the Superior Court.

(*c*) Again in the brief filed in the Supreme Court of the State of Washington, at page 82, will be found a quotation from the decision of the New York Court of Appeals in *Kinnier vs. Kinnier*, 45 N. Y., 535, reading as follows:

"But, aside from this consideration, we have a judgment rendered nearly sixteen years ago, of a court of one of the States of the Union having jurisdiction of the general subject matter of the action, which decrees a divorce of the marriage contract between the defendant and her former husband. I think such a judgment is protected by the Constitution of the United States, which declares that 'full faith and credit shall be given each State to the public acts, records and judicial proceedings of every other State.'"

To which was appended a statement of counsel as follows:

"The court held, after a thorough examination, that under those conditions, the decree rendered in Illinois could not be collaterally attacked. There is a great similarity between this case and the one now before this court. The divorce was granted in the State of Kansas in 1887, nearly thirteen years ago. It recites the jurisdiction of the court of both the parties and subject matter of the action, and therefore should not at this time be permitted to be collaterally assailed."

Surely the attention of the Court was here called to the full faith and credit clause which was recited verbatim.

It must at all times be remembered that the judgment in the Superior Court was in favor of the Society, it was not the appellant assigning errors to the Supreme Court.

Having regard to the thoroughly well-known and understood provision of the Constitution in question, we think the foregoing was sufficient to and did call attention of both of the state courts to the rights claimed. It is impossible to conceive of anything more being required when

the full faith and credit clause is relied upon. In other cases, as for instance the impairing of obligations of contracts, although the provisions of the Constitution may be thoroughly familiar to the court their application may not be apparent. But one who pleads a judgment necessarily relies upon it and claims rights under it, and when the judgment is that of a sister state, and the question is whether or not it shall be given effect, one cannot conceive of any court forgetting or overlooking the mandate of the Constitution.

(d) But according to the more recent decisions of this Court, the original strictness of the rule requiring the federal right to be specially set up and claimed even in cases other than those involving the full faith and credit clause, has been relaxed. And now it appears to be well settled that all that is necessary is that there shall be "something in the case" showing that the purpose of the Statute has been fulfilled, by the federal question having been in fact brought to the attention of the Court. And if it appear that the federal question has been entertained and decided by the State Court, that is of itself sufficient.

In the case at bar it was said by the Supreme Court of Washington (Tr. page 348), "This divorce record is plead and introduced in evidence, and effect is sought to be given to it by virtue of Section 1, Article IV, Constitution of the United States and the Laws of Congress, to give full credit to the records of sister states." And at page 342 it was said the Society had introduced in evidence "a record of said divorce proceedings authenticated as required by the laws of the United States," and again on the same page it was said, citing *Trowbridge* vs. *Spinning*, that upon the question of jurisdiction arising under the full faith and credit clause of the constitution, the state court would take judicial notice of the laws of Kansas.

We consider it unnecessary to quote largely from decisions of this Court, with which its members must be familiar. We refer to *Missouri, etc.* vs. *Elliott*, 184 U. S., 534, in which it was said:

"It is equally true that even although the allegations of federal right in the State Court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a federal nature was brought to the attention of the state

court, yet if the state court in deciding the case has actually considered and determined a federal question, although arising on ambiguous averments, then a federal controversy having been actually decided, the right of this Court to review obtains. *Oxley Stave Co.* vs. *Butler*, 166 U. S., 648, 660. All that is essential is that the federal questions must be presented in the State Court in such a manner as to bring them to the attention of that tribunal. *Chicago, &c. Ry. Co.* vs. *Chicago*, 166 U. S., 226. And of course where it is shown by the record that the State Court considered and decided the federal question, the purpose of the Statute is subserved. And so controlling as to the existence of the federal question is the fact that it was actually considered and decided by the State Court, that it has been held, although the general rule is that the raising of a federal question in a petition for rehearing in the highest court of the State is too late, yet when a question is thus raised and it is actually considered and decided by the State Court, the right to review exists. *Mallett* vs. *North Carolina*, 181 U. S., 589, 592."

In the case of *Tullock* vs. *Mulvane*, 184 U. S., 497, 503, the following language was used: " * * * were expressly considered and directly passed upon by both the trial court and the Supreme Court of the State of Kansas, *which latter fact in and of itself suffices* to present the federal question even if it had been otherwise ambiguously raised upon the record, which is not the case." (Italics here and elsewhere ours.)

In *Sweringen* vs. *St. Louis*, 185 U. S., 38, 45, 46, it was said: "We do not hold it was necessary to *plead* the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the Court."

In *Home for Incurables* vs. *New York*, 23 Sup. Ct. Rep., 84, it was said: "Later cases in this Court have expressed the additional thought that if the highest court of the State assumes that the record sufficiently presents a question of federal right and decides against the party claiming such right, we will look no further and will proceed to a consideration of that question, unless the decision is made to rest in part upon some ground of local law sufficient enough in itself to sustain the judgment independently of any question of federal right."

And in the case of *Johnson* vs. *New York Life Ins. Co.*, 23 Sup. Ct. Rep., 194, 195, it was said: "Conceding that it was unnecessary to set it up in any *pleading* anterior to the trial, since it could not be claimed that the right had been denied to her until the trial took place, it was clearly her duty to make the claim either on the motion for a new trial, or in the assignments of error filed in the Supreme Court of the State. In neither does it appear, nor is there any allusion to it in the opinion of the Supreme Court. It first appears in the petition for a writ of error from this court. This is clearly insufficient."

The application of the decision last referred to to this case will be apprehended when it is remembered th at the decision was in favor of the Society in the Superior Court and that it was the respondent in the Supreme Court, and that the decision of the Supreme Court here complained of was the first occasion in which the federal right claimed was actually denied.

We therefore submit that the motion to dismiss upon the special ground assigned by the minor defendant in error should be overruled.

The next ground of the motion is that there was no federal question necessarily involved because there was another ground, non-federal, sufficient to sustain the judgment.

In none of the briefs, as we read them, is it denied that apart from such other ground the refusal of the State Court to give effect to the decree of divorce does present a federal question which this Court has jurisdiction to determine. We therefore proceed to discuss the question whether or not there was such an additional ground, non-federal in character, sufficient to sustain the judgment.

In this behalf the defendants in error refer to that portion of the opinion of Mr. Justice White, of the Supreme Court of Washington, which is to be found on page 360 of the Transcript, that if the presumption then being referred to did not control, "we think that the respondent is estopped from disputing the title of these children." It is argued that this estoppel is itself sufficient basis of title by which the claims of the defendant in error to the premises in dispute may be sustained.

As all the essential elements of an estoppel in pais are absent from the case, it would be startling if such effect could be given to the opinion of Mr. Justice White. We respectfully insist that if the opinion be read as a whole it will be found that the Washington court did not entertain any such idea of the law of estoppel, and did not intend to hold that even if effect were given to the decree of divorce, the children would nevertheless be the owners of the property.

It will be remembered that the Society had set up different defenses. Among others, that by the decree of divorce Lucy A. Tull had been debarred of all interest in the husband's property in Kansas, with the proceeds of which property the demanded premises were purchased. Also, and independently of the divorce, that by the laws of Kansas there was no community property, but that all the property belonged to the husband, and in like manner that the demanded premises having been purchased with the proceeds of the Kansas property Lucy A. Tull never had any interest therein. In the trial court the Society had called as an expert witness Mr. Crow, who had been a practicing lawyer in Kansas, and who produced two volumes of the statutes of that State. From these statutes it appeared that the common law prevails except in so far as it has been modified by statute; as we think it may be gathered from the other statutes introduced in evidence that there is no such thing as community property in Kansas, but that the wife has the old right of dower. Mr. Justice White, in his opinion, however, held that the evidence does not show that there is no law of community property in Kansas, and held that in the absence of proof to the contrary it must be presumed that the laws of Kansas are the same as those of the forum. Accordingly, he concluded that the "*presumption*" created by the laws of Washington to the effect that all property acquired subsequent to marriage was community property, had not been overcome by the Society. It was in this connection that he used the language so desperately seized upon by the defendants in error on this proceeding. Giving the language a general meaning, it is not unreasonable If it was left in doubt *merely as a question of fact* whether this was community property, the conduct of the parties treating it as such would be competent and per-

suasive testimony, but to hold in the legal sense that although the children never had any original right to these premises they could acquire such right under the doctrine of estoppel because the Society had supposed or assumed, out of abundant caution, (p. 127), that they had such right, would involve an absurdity, and an announcement of general principles of law to which no Supreme Court in this nation would subscribe. It would be a sheer waste of energy to find for this Court authorities on a proposition so elementary. One of its former members in his earlier years, when Chief Justice of the Supreme Court of California, said in the case of *Biddle-Boggs* vs. *Merced Mining Co.*, 14 Cal., 279, 367, et seq.): "But to the application of this "principle with respect to the title of property, it must "appear, *first*, that the party making the admission by "his declaration or conduct, was apprised of the true state "of his own title; *second*, that he made the admission with "the express intention to deceive, or with such careless "and culpable negligence as to amount to constructive "fraud; *third*, that the other party was not only destitute "of all knowledge of the true state of the title, but of "the means of acquiring such knowledge, and, *fourth*, "that he relied directly upon such admission, and will be "injured by allowing its truth to be disproved. These "qualifications in the application of the doctrine will be "found fully sustained by the authorities. *There must be "some degree of turpitude in the conduct of a party before "a Court of Equity will estop him from the assertion of his "title—the effect of the estoppel being to forfeit his property "and transfer its enjoyment to another.*"

And quoting from a Pennsylvania case, further said:

"To the constitution of this species of estoppel, at least three ingredients seem to be necessary: first, misrepresentation or willful silence by one having knowledge of the fact; second, that the actor, having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done, and thirdly, that injury would ensue from a permission to allege the truth. *And these three things must appear affirmatively.*"

The judgment of the Supreme Court of Washington, if given the effect claimed for it by the defendants in error, would be in direct conflict with elementary principles of

law. Upon this consideration alone it should be refused such an interpretation by this Court.

Maguire vs. *Tyler*, 8 Wall., 650–665.
Klinger vs. *Missouri*, 13 Wall., 257;
Johnson vs. *Risk*, 137 U. S., 301.

As further proof that the Supreme Court of Washington did not intend to render judgment in favor of these defendants in error upon the independent ground of estoppel, this Court is respectfully referred to the former portion of the opinion of that Court treating of the Kansas divorce, Transcript pages 342 et seq., covering over seven pages of the record. As we think, throughout that opinion it is manifest that the Court considered the Kansas divorce an absolute bar unless it could in some manner be avoided. There is no suggestion that the effect of the divorce could be avoided upon the principle of estoppel by conduct on the part of the Society. At the outset (page 342) it is said the Society claims that by operation of the Kansas decree the wife and those claiming under her are barred of any claim in or to the property of the husband, and that the property in controversy was purchased with money of the husband owned by him at the time of the divorce. The law of Kansas is then quoted at length to the effect that the divorce *is* a bar against the guilty party of all property claims.

The labor and effort expended in discussing the Kansas divorce and reaching a conclusion as to its effect, is manifest upon even a casual reading of the seven pages. A bare majority of the Court subscribed to the opinion, two judges dissenting. We cannot believe that any of the judges were entirely satisfied. Resort was had to the ex parte complaint filed by Lucy A. Tull which the lower court had refused to receive in evidence. The most technical scrutiny was given to the record. It was held that the divorce laws of Kansas had not been complied with because no *affidavit* of service of summons appeared in the record. The Society had set up in its answer such law and shown the necessity of such an affidavit, and apparently no question had been made by any one as to the existence of such an affidavit. (The briefs show the contrary, Appellants p. 50, Respondents p. 83.) As may be seen from page 46 of the petition for rehearing, the record

in the court below *did* contain such affidavit of the Sheriff of Sacramento county sworn to April 2d, 1887, before the County Clerk of that County, and in the petition for rehearing a copy was set out verbatim, and it was said (page 48) that if the record, as certified to the Supreme Court, fails to contain the affidavit "it is a mere clerical oversight in copying."

Is it possible that the Supreme Court of Washington knew and believed during all this time that the Kansas decree and all questions appurtenant thereto were immaterial, and that the whole case could be and would be decided and disposed of in a few lines upon another and independent ground?

In these days appellate courts are generally overworked; and it is their duty as well as their privilege to dispose of cases as easily and speedily as possible. There is not usually much complaint that this privilege is not availed of by the judges; the inclination to establish a short circuit is not confined to the natural forces.

Again the constitution of the State of Washington requires its Supreme Court to state the reasons of its decisions. The purpose of the requirement is self-evident. Under the test of that constitutional provision if the Judges had been required to furnish reasons before giving such a decision, the one would have been as impossible as the other. Again, if this was the ground of decision, it is unsupported by the pleadings. It is found neither in the original complaints nor in the replications. A judgment under such conditions involving so much property would be a novelty if not a nullity. In the same Biddle-Boggs case above referred to, Judge Field said (14 Cal. 356): "The court cannot properly, even upon the consent of parties, pass upon questions not raised by the written allegations of the pleadings," and Mr. Justice Brewer, in the case of *Reynolds* vs. *Stockton*, 140 U. S., treated in unmistakable language, the same subject. It is true, as stated in Mr. Dewart's brief, that the defendants in error did claim that the Society was estopped, not however, in their pleadings, but in their Brief on Appeal, but, as we submit, this record shows that the main reliance of these defendants in error throughout the case was that their mortgage lien should be foreclosed. In an action of *that* character the claim of estoppel might not be

so unreasonable. It might fairly be argued that F. M. Tull should be estopped to deny the validity of the mortgages, or to say that they were without consideration because the heirs had no title and therefore none passed under the probate sale. The general rule is that judicial sales are without warranty, and that the purchaser must know at his peril that in exchange for his purchase money he will take only such title as the defendant in the execution may have had, and it may be that he will take nothing. A mortgagee under such conditions may be concluded, but we have never heard that a grantee of real property is estopped from denying, if need be, that his grantor ever had any title; and to go further and say that the grantee is not only estopped by the deed, but that if it turns out that the deed is itself void, he not only loses his property, but by process of estoppel transfers his own true title to his original grantor who otherwise never had any title, together with, as in this case, one-half of $120,000 worth of improvements—is to travel beyond the confines either of reason or of law.

Assuming the Kansas divorce to be out of the case, and that the parties at all times were husband and wife, there was still some question as to the community character of this property; there was some evidence introduced that the wife had herself three hundred dollars in money and a farm in Missouri which was sold for one thousand dollars; there was also a controversy as to when Tull acquired title to the property in Washington, whether before or after he and his wife ceased to be residents of Kansas and subject to the laws of that State regulating property rights of married persons. If they were residents of Washington when the property was purchased, being real property it would take its character from the laws of Washington. Prima facie it would be community property. The burden of proof would be upon any one contending for the contrary to show what money was used to purchase the property and what was the law of Kansas which made that money the separate property of the husband. The presumption had also been applied that in the absence of proof the property laws of Kansas must be the same as those of Washington. Upon all such questions the conduct of the parties might well be considered as competent but not conclusive testimony. It was also

said by the Supreme Court that Tull and his wife had agreed as to the status of the property before her death, and this status was recognized by the respondent. It seems impossible that the Supreme Court should have been considering original rights of property. The alleged agreement was wholly indefinite and was by parol. If Lucy A. Tull had been divorced and had lost all her property rights, she could not acquire them again in that way.

The respect due to the Supreme Court of Washington from some of these defendants in error and from some of their counsel should *estop* them from asking that its opinion be given such a construction.

Finally, we respectfully insist that the opinion shows upon its face that nothing of the kind contended for by the defendants in error was officially determined. The concluding language of the opinion is "*but* the *presumption* that it was community property not having been overthrown, *it is not necessary to further comment on the effect and character of this estoppel.*" From this it appears that the court rested its decision upon the presumption of community property. Of course this means, apart from the effect of the divorce, if there was one; and, especially in view of the constitutional mandate, the concluding words of the opinion must be read as saying that it was not *necessary* to decide, and that the court did *not* decide, upon the effect of the estoppel *even as applied to the question of community property apart from the effect of the divorce.*

We are content to leave this branch of the case without further discussion.

It now remains to answer the alternative motion to affirm on the ground that even if this Court has jurisdiction the case presented is frivolous and taken for delay.

We are disposed to think we have already made a sufficient *prima facie* case, which is all that is required upon this preliminary motion. In one of the briefs there is a heading "findings of fact", and in the other it is said that although the Supreme Court of Washington did not make "formal findings of fact" it did find in its opinion, etc. The current of thought appears to be that if the case was decided upon questions of fact it will not be reviewed upon this writ of error.

We do not agree with the premises which counsel have laid down. The Supreme Court of Washington is essentially a court of appeal. (See Constitution, Appendix A.) It does not in any case hear testimony or try a case *de novo* although it is provided by Statute, (Ballinger's Code, 6520. See Appendix B.), "In actions, legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the Supreme Court *de novo* so far as the findings of fact or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement."

What is found in the opinion of the Supreme Court here is matter of legal decision, in review of the action of the lower court. Findings of fact are made by courts from whose judgment an appeal lies; their office being to simplify the examination of the case upon appeal. We contend that the findings of fact in this case were made by the Superior Court at Spokane, and were in our favor.

We do not dispute the general principle that a writ of error brings up questions of law and not of fact, but if the necessity of the case should so require we would contend that when relief is sought from this court on account of a refusal of a State Supreme Court to give to a party his constitutional rights, this court will not permit itself to be foreclosed by any findings of law or fact made by the State court, but will examine for itself the whole case as it was presented to that court. Whether or not full faith and credit has been given to a sister State's judgment in any given case is a question for this court to decide; it is a legal question and an entirety. We do not know at present of any case in which this question has been involved. There are many in which this court has said that when rights under the Constitution are claimed to have been denied, it will not consider itself bound by the construction placed upon a contract or state statute by the highest court of a State.

In *Dower* vs. *Richards*, 151 U. S., 658, cited by defendants in error, it was said at the top of page 667:

"When indeed the qnestion decided by the State court is not merely of the weight or sufficiency of the evidence

to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of federal law, the decision may be reviewed by this court."

See also the extract from opinion of Mr. Justice Catron on the same page.

In *Jefferson Bank* vs. *Skelly*, 1 Black, 436, 443, it was said:

"Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State by its authority."

In the case of *Laing* vs. *Rigney*, 160 U. S., 531, this court upon an issue of full faith and credit not only considered the evidence given in the court below, but apparently undertook to adjust the weight or quality of that evidence, and to hold against the testimony of the expert witness who was examined as to the laws of the State of New Jersey considered as a fact.

In the case of *Jacobs* vs. *Marks*, 182 U. S., 583, the syllabus reads:

"The question whether the record and judicial proceedings in the Michigan court received full faith and credit, in the courts of Illinois is one for this court to consider and determine; and it holds that, upon the facts disclosed in the record, the courts of Illinois did give to the judgment and judicial proceedings of the state court of Michigan full faith and credit, within the meaning of the Constitution."

However, in this case we feel confident that we can even within the most restricted limits prescribed by counsel for defendants in error, establish that due faith and credit was denied to the Kansas judgment, and without legal justification.

There was no issue of fact whatsoever tendered either to the Superior Court or to the Supreme Court in impeachment of the Kansas divorce, excepting only the existence of such a record; if therefore the Supreme Court decision be treated as a finding of fact, as to domicile, residence, fraud, service of summons, or authority of the attorney to ap ear, such finding was without the issue;—in the language of the Supreme Court of California (Morenhaut vs. Barron, 42 Cal., 591, 605) "*it was useless and idle.*" A final judgment of a court having conceded jurisdiction both of the parties and of the subject matter may be set at naught collaterally, because not responsive to the matters controverted. *Reynolds* vs. *Stockton*, 140 U. S., supra.

We beg to repeat also the remarks of Judge Field, 14 Cal., already quoted in this brief.

That the pleadings raised no issue as to the judgment of divorce except its mere existence, is clear as well from the decisions of this court as of the courts of the State of Washington. In *Hill* vs. *Mendenhall*, 21 Wall., 453, 454; after saying that the record of a sister State's judgment may be contradicted to the extent of showing want of jurisdiction, it was said by the Supreme Court of the United States,

"But if it appears on the face of the record that the court did have jurisdiction extrinsic evidence to contradict it is not admissible under a plea of *nul tiel record* * * * *nul tiel record* puts in issue only the fact of the existence of the record and is met by the production of the record itself, valid upon its face, or an exemplification duly authenticated under the Act of Congress * * * defects appearing on the face of the record may be taken advantage of upon its production under a plea of *nul tiel record, but those which require extrinsic evidence to make them apparent must be formally alleged before they can be proven.* This we believe to be in accordance with the practice of all courts in which such defenses have been allowed, and it is certainly the logical deduction from the elementary prin-

ciples of pleading. * * * It follows that upon the pleadings in this case, judgment should have been given for the plaintiff after proof of the record, showing as it did jurisdiction of the defendant by reason of his appearance by an attorney."

And in *Richie* vs. *Carpenter*, 2 Wash., 512; 26 Am. St. Rep. 777, the suit was upon a Kansas judgment. The Supreme Court said: "The judgment is pleaded in the third paragraph of the complaint; the denial thereto in the answer was as follows: 'The defendant denies the allegations containad in the third paragraph of plaintiff's amended complaint.'" He also denied, 2 Wash., 514 that the District Court in Kansas ever obtained any jurisdiction over the subject matter of any controversy between plaintiff and defendant, etc. He also denied that any cause of action in favor of plaintiff and against defendant ever existed, or was pending in said District Court, etc. He also denied that any cause of action between plaintiff and defendant was ever submitted to said District Court with the knowledge or agreement of the defendant, or any one acting for him, etc. The defendant having appealed the Supreme Court said:

"He also contends here, that as his affirmative defense was not replied to or denied by the plaintiff, that it must be taken as true, and that judgment should have been rendered in his favor thereon. It is doubtful whether the defendant's whole answer raised any other issue than that of *nul tiel* record, and this is the only defense available under a general denial in an action upon a judgment of a court of record of a sister State. The so-called affirmative defenses were denials in form, and nothing was pleaded therein alleging that the court had not jurisdiction of either the subject matter of the action, or of the defendant's person. The first paragraph of his further defense is the only one in any wise tending to show a want of jurisdiction of the subject matter, wherein it seems to deny that the Court had jurisdiction of anything. The first part of the second paragraph attempts to deny that the cause of action ever existed. These amounted to nothing more than statements of conclusions of law. The remaining part of this defense related to wholly immaterial matters. The affirmative defense could not have stood, had it been attacked in the Superior Court. *Pleas*

to the jurisdiction must be direct and certain, and set up the facts which go to show a want of it." Citing *Hill* vs. *Mendenhall*, 21 Wall., 453, and other cases.

The Court afterwards said in its opinion: "The main controversy in this case was as to what issues were raised by the pleadings, and as to where the burden of proof rested thereunder. The disposition made of the first point carries the second with it."

There can be no claim in this case that the absence of pleadings was waived by the Society. The transcript of the record will show on the contrary that objections were persistently made to questions as to Tull's residence and were overruled (see objections, top of page 205); such testimony was, however, competent for another purpose, towit: upon the independent issue of whether this was community property apart from the effect of the Kansas divorce, if there was one.

There was no evidence of fraud in obtaining the divorce, unless it be the ex parte complaint filed by Lucy A. Tull, to which objection was not only made, but was sustained. There was no testimony at all as to service of summons, or authority of the Kansas attorney to appear. As to this last question we would refer this Court to page 347 of the record, showing that the Supreme Court of Washington inferred that the attorney could not have been authorized, because his general denial to the divorce complaint "*denies her marriage to the plaintiff and the paternity of her children*"!

As we have seen, one of the replications expressly alleged that Tull and his wife "resided in Kansas *up to* and prior to *May 20th, 1887*" (Tr. 314.) Another replication alleged that about the *first day of May 1887*, Tull and his wife left Kansas, and when in the act of boarding the train she was served with process, etc. (Tr. 315.) These replications not only show residence in Kansas, but show service of summons. The divorce might have been set aside for fraud, but until so set aside it remains valid. It has been repeatedly held by this Court that sister state judgments cannot be collaterally attacked on the ground of fraud. 116 U. S. 1. 138 U. S. 459. 155 U. S. 13.

It should also be remembered that as between Tull and his wife this was not a foreign judgment, but a domestic judgment. The mere fact that she was without the terri-

torial limits of the State at the time of service of summons, even if she did not afterwards appear by attorney, makes no difference. Many cases may be cited. We content ourselves with referring to one: *Ousely* vs. *Lehigh Valley, etc.*, 84 Fed. Rep. 602, in which a money judgment recovered in a Canadian court upon service of summons upon a defendant in New York was held to be good by the Circuit Court of the United States in Pennsylvania.

The judgment of the Supreme Court of Washington is subject to attack in review of the evidence, and upon grounds which are well recognized as legal exceptions, to be considered upon writ of error; namely: that there is *no* evidence (at least none within the meaning of the modern rule), to justify the conclusion of the State Court that neither of the parties to the divorce suit had a domicile in Kansas; and that the evidence being undisputed, its *legal effect* was a question of law and was erroneously determined by the State Court.

There was no conflict in the evidence as to domicil or residence; F. M. Tull was the only witness on that subject; it is surprising how little evidence there is in the record as a basis for the opinion of the State Court.

We believe that upon the following pages of the transcript will be found all the testimony in the case having any bearing upon the point of domicil or residence, viz.: pages 75-78, 80, 108-114, 204, 205.

In fact all the evidence having a direct bearing upon the question of domicil may be comprised within a few lines.

F. M. Tull went first to Spokane in December, 1886 (page 75), and procured a contract for purchase of a part of this property, paying one hundred dollars on account; in the contract he is described as of Kingman, State of Kansas, (pages 76, 109). On page 77 he testified that prior to visiting Spokane he had sold out all his business and property in Kansas "with a view of hunting a location before he left home. I did not know where I would locate when I left home." After some traveling landed at Spokane and "made this purchase and located here." "I decided to locate here and came back here as soon as I could get here." After making the contract of purchase went back to Kansas and wound up my affairs there, preparing to come here as soon as I could get here. Returned some time in the spring. Returned in March or April.

Before leaving the first time had contracted for brick to erect a brick block on the property. Cannot fix dates; was in Spokane two or three times and went away again and then came back. "Was here at least two or three times that spring before I was ready to go ahead with the building on account of waiting for the brick to be burned." At page 109: "Was in business in Kansas for many years prior to coming to Spokane." (Page 110) Commenced building in May or June. (Page 111) That was in June, 1887. (Page 111, 113). The first time after the December trip was in the spring, about April. Stayed then "a few days, two or three weeks; something like that."

"Q. Came here to finish making arrangements for the building, then you went away from here. Where did you stop while you were here?

A. I think I stopped at the California House. That was a hotel.

Q. Were you alone when you came here?

A. Yes, sir.

Q. You did not bring your family with you?

A. No, sir.

Q. When you went away from Spokane, how long were you absent before you returned again?

"A. I returned some time in May, I think, **the last time to stay.**"

Q. I understand you to say, Mr. Tull, that you came here the last time, or returned the last time, in May?

A. Yes, sir; some time in May.

Q. Some time in May. After that time you remained here continuously during the time you were erecting the building which you mentioned; the first building?

A. Yes, sir.

Q. And getting ready to go into business?

A. Yes, sir.

Q. And that you went into business, or started into business I think, about August of that year?

A. Yes, sir; I came back here and stayed until the first of July. On the first of July I went East to buy my stock."

(Page 204) "Q. (Re-direct) When did your wife, Lucy A. Tull, leave Kansas?

A. Some time in March 1887—I don't mean March, I mean Jannary.

Q. Where was she in February, March and April, 1887?

A. I do not know where she was. She went to Missouri from Kansas, to her father's. I do not know where she was.

Q. Where was she on the 2nd day of April, or about that time?

A. I think she was in California; California some place, likely. I could not say the exact time she went there; some time in the spring. We did not go together. She came to Spokane in July, 1887."

The complaint of the wife not admitted in evidence in the trial court but considered by the Supreme Court, will be found at page 284 of the transcript.

It must be remembered that the original domicil in Kansas is conceded, and that the divorce decree is itself evidence of domicil to be overcome only by clear and satisfactory testimony. We submit that apart altogether from admissions in the pleadings, and lack of issues, the evidence adduced is wholly insufficient to show that the Kansas domicil had been lost by either the husband or the wife prior to May, 1887, at which time, as Tull says, he came to Spokane, "this time to stay." Prior thereto he had an unexecuted intention to locate in Washington after he had settled up his affairs in Kansas. It was not until May at the earliest when he came to stay that he took up his home and permanent abode in the State of Washington. It will be remembered that in his complaint in Kansas filed in February, he alleged under oath that he was then and for a long time had been a resident of the State of Kansas.

We do not understand the Supreme Court of Washington as holding the wife's complaint, at page 284 of the transcript, to be substantive testimony, but we will not pursue the inquiry. We are content to submit to this Court whether the faith and credit to which the Kansas judgment is entitled under the Constitution of the United States can be frittered away in such manner. Upon reading that complaint, however, we find its allegations rather tend to support than to destroy the validity of the divorce record in respect of domicil and residence. She states that the property in Kansas was sold in January or February, 1887; that about the 14th of February, she was prevailed upon to visit her father's home at Andover; that about March 7th, 1887, plaintiff and defendant went to Sacramento, California, upon his representation that he desired to make California his home (this was after the divorce

suit had been commenced.) That on or about April last the defendant returned to the home of the plaintiff in Sacramento" (page 287). "About the 11th of May he left the plaintiff at Sacramento to be gone for two weeks, pretending he was going to Kingman, Kansas, for the purpose of settling up some unfinished business, when he would join plaintiff within two weeks, all of which was false," etc. (page 288).

The testimony as to the Kansas divorce is meager in the extreme; some of the replications deny any information or belief on the subject. No effort appears to have been made to examine the Sheriff of Sacramento County or the attorney in Kansas who appeared in the divorce proceedings, or to procure any evidence to establish what the defendants in error now claim to be facts; of course in view of the pleadings, this lack of evidence cannot be attributed to the plaintiff in error.

Upon this branch of the case we respectfully insist that there is no evidence to warrant a holding that either of the parties had lost their Kansas domicil prior to the commencement of the divorce proceedings, and that the adjudication of the Kansas court in that behalf has not been overcome.

Upon these motions we do not notice the other assignments of error. We ask that the motions to dismiss or to affirm be denied.

Respectfully submitted,

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W. W. HINDMAN,
W. S. GOODFELLOW.
Counsel for Plaintiff in Error.

APPENDIX "A."

CONSTITUTION OF WASHINGTON.

ART. IV.

§ 1. JUDICIAL POWER, WHERE VESTED.—The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

§ 2. SUPREME COURT.—The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision. The said court shall always be open for the transaction of business except on non-judicial days. In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time, and may provide for separate departments of said court.

§ 4. JURISDICTION.—The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before the superior court of the state, or any judge thereof.

APPENDIX "B."

BALLINGER'S CODE.

§ 6520. WHAT MAY BE REVIEWED.—Upon an appeal from a judgment, the supreme court may review any intermediate order or determination of the court below which involves the merits and materially affects the judgment, appearing upon the record sent up from the superior court. Any questions of fact or of law, decided upon trials by the court or by referees, in either legal or equitable causes, may be reviewed, when exceptions to the findings of fact or to the conclusions of law, or both, have been duly taken, by either party and sent up in the record on appeal; and in actions legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court de novo, so far as the findings of facts or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement.